NOOR AZAHAR HABIN

v.

RAJASWARI SITHAMPARA PILLAI & ANOR.

HIGH COURT MALAYA, MUAR
RICHARD TALALLA JC
[CIVIL SUIT NO. 25-158 OF 1988]
29 JULY 1990

EVIDENCE: *Defence witness offered for cross-examination - Prosecution did not cross-examine on relevant issues - Weight of such testimony - Section 114(g) Evidence Act.*

CIVIL PROCEDURE: *Accident case - No particulars in pleading - Further and better particulars of claim not requested nor supplied - Too wide - Proper and definitive - Order 18 r. 12 Rules of the High Court 1980.*

TORT: *Liability - Position of vehicles after accident - Causation - Contributory negligence - Blameworthiness - Section 12(1) Civil Law Act 1956.*

DAMAGES: *Paraplegic - Unable to engage in former employment - No suitable sedentary employment - Multiplicand for future loss of earning - Nursing care - Loss of EPF contributions.*

This case involved a collision between the plaintiff who was riding a motorcycle and the defendant who was driving a car on a side road. The collision occurred as the defendant turned right at the junction of the main road and the side road. The dispute was as to the liability and causation.

There was also argument as to the effect of the failure of the prosecution to cross-examine one of the defence witness DW2 who was offered by the defence. The plaintiff became a paraplegic and there was a dispute as to multiplicand for future loss of earnings, multiplier for future nursing care and entitlement to loss of EPF contribution. Observations on the manner of pleading of particulars in accident cases.

Held:

[1] There is a general rule that failure to cross-examine a witness on a crucial part of the case will amount to acceptance of the witness testimony; however the facts and circumstances of each case need to be examined to ascertain whether the rule applies and if so, to what extent.

[2] On the facts of this case, DW2's evidence was wholly irrelevant to any issue in this case; therefore, under the rule, the acceptance of this evidence was useless to the issues and brings nothing to the application of the rules.

[3] (a) In this case, the defendants particulars constituted a comprehensive accusation of nearly every misfeasance a motorist is capable of committing on a public road; the defendant did not plead particularly her main contention of the plaintiff travelling on the middle of the road.

(b) A number of the particulars are repetitive, wholly irrelevant and tend to confuse rather than define the issues; the practice of pleading particulars of negligence in the way that the defendant has done in this case is rampant.

(c) Particulars so pleaded amounting in the end to effectively no particulars at all, are of no assistance to a party having to answer an allegation of negligence; this practice should be discouraged.

(d) In this case however, there was no complaint from the plaintiff in respect of the defendant's pleadings or the lack of it.

[4] (a) On the facts and evidence of this case and taking into account s. 12(1) of the Civil Law Act, the plaintiff did not at all contribute negligently to the cause of the accident and had no share in the responsibility for the damage he suffered.

(b) His requirement to keep to the left hand side of the road pursuant to the provisions of r. 13 of the Highway Code could have been in respect of a duty he owed to certain other users of the road but not the defendant, who was on the side road to the left of him intending to drive the motorcar onto the road.

(c) There was no question of the defendant driving onto the main road in right and reasonable expectation of the defendant riding along the left side of the road, which he was not doing, thereby resulting in the accident.

[5] Although the plaintiff's former job was made available to him and although his employers were prepared to make adjustments to accommodate this disabilities, the injuries of the plaintiff was such that he is unable to resume employment.

[6] The defendant failed to lead evidence of suitable alterative employment and failed to prove that the plaintiff ought reasonably to have taken suggested mitigating steps; consequently, the Court could not make a deduction in the multiplicand.

[Defendant wholly liable.]

Cases referred to:
Wong Swee Chin v. PP [1981] 1 MLJ 213
Transport Ministry v. Garry [1973] 1 NZLR 120
Yeoh Cheng Han v. Official Administrator, Malaya [1972] 2 MLJ 7
West Rand Central Gold Mining Co. v. R. [1905] 2 KB 391
Gautret v. Egerton [1867] LR 2 CP 371
Wells v. Weeks [1965] 1 All ER 77
Esso Petroleum Co. Ltd. v. South Port Corporation [1956] AC 218
Pandorf v. Hamilton [1886] 17 QBD 670
Admiralty Commissioners v. S.S. Volute [1922] 1 AC 129
Boy Andrew v. St. Rognvald [1948] AC 140
Stapley v. Gypsum Mines LD [1953] AC 663
Davis v. Swan Motor Co. (Swansea) Ltd. Ld. James Third Party [1949] 2 KB 291
Roper v. Johnson [1873] LR 8 CP 167
Garnac Grain Co. v. Faure & Fairclough [1968] AC 1130
Baker v. Dalgleish S.S. Co. [1922] 1 KB 361

Legislation referred to:
Civil Law Act 1956, s. 12(1)
Evidence Act 1950, s. 114illus.(g)
Highway Code, r. 13
Road Traffic Act 1960 [UK], s. 74
Rules of the High Court 1980, O. 18 r. 12

Other source referred to:
Bullen & Leake's Precedents of Pleadings, 11th Edn., p. 537
Mc Gregor on Damages 13th Edn., p. 145

For the plaintiff - N. Jegatheeson; M/s. John Ang & Jega
For the defendants - Manjeet Singh Dhillon; M/s. Manjeet Singh Dhillon

JUDGMENT

Richard Talalla JC:

On 23 August 1987 at about 7.30 p.m. the plaintiff was riding his motor cycle along the Kluang/Mersing road from the direction of Kluang town in the direction of Mersing. At the same time and place the defendant was driving a motor car number JAN 8093 along a side road which was on the left of the main road as one faces Mersing and which side road led to and connected with the main road. The defendant was proceeding towards the main road, stopped at the junction, then went on with the intention of turning right in the direction of Kluang town when the motor cycle and the motor car came into collision, the motor cycle colliding into the driver's door of the motor car. There was a crest along the Kluang side of the main road which the plaintiff had to proceed over before coming to the junction of the side road with the main road.

A police sketch plan with key and photographs of the scene and the 2 vehicles involved were produced in evidence.

At the trial before me both the plaintiff and the defendant gave evidence on oath stating their respective versions of how the accident happened.

The plaintiff's story was that he first sighted the motor car when it was already at the mouth of the junction and it dashed out instantly giving no time for him to avoid it. He was travelling at about 60 kmh just before the accident. When he first saw the car coming out of the junction his motor cycle was about 28 feet from the car. In cross-examination he said that he was travelling along that part of the road left of the centre white line, that he had to take a slight uphill gradient before coming to the junction which was so he testified, some 50 to 60 yards from the crest of the hill. He proceeded straight and collided into the car. It was put to him that he was not travelling along the left edge of the road to which he truthfully agreed. It was put to him that he was travelling at speed. He maintained that he was travelling at 60 kmh. He agreed that before he crested the hill he could not see the junction and that he had to accelerate to go up the hill. However, he said that he was travelling at about 60 kmh going up and coming down the hill. It was put to him that if he had been riding on the left side of the road the accident would not have happened to which he answered that that was not necessarily so. He disagreed, when it was put to him, that he did not see the car suddenly come out of the junction. It was also put to him that the car was about to complete crossing the left half of the road when he first saw it. The plaintiff disagreed as did he to the suggestion that the accident happened because he came over the hill at great speed. In re-examination he said that as he was coming down the hill it was not possible for him to see a car coming from the side road before the car reached the junction and he frankly admitted to not being able to say whether or not he could have avoided the accident had he been travelling on the left side of the road.

The defendant's version of the accident was that she was driving the motor car. Her husband and 2 children were in the car, the husband sitting in the front passenger seat. They were going to Kluang town. She stopped at the junction. She confirmed the existence of the crest which according to her was about 70 to 80 yards from the junction. After stopping at the junction she looked at both sides of the road to see if any cars were coming. Towards the Kluang side she did not see anything. She said:

> Nothing was coming. Then I put my first gear and I proceeded... When I proceeded in first gear I heard a sound and I saw something flying.

When she heard the sound of the collision she was shocked. She was then asked:

> On which point of the road, how far had you travelled before you heard the sound?

She answered:

> When I turned my steering I heard the sound.

She said that all of a sudden she saw something flying. Before that she was going with her first gear and she was going very slow. She was reminded that the plaintiff said that she dashed out of the junction and was asked to say whether that was correct to which she answered in the negative. Again she was reminded that the plaintiff said that she dashed out of the junction when he was 28 feet away. She answered that this was not true. She further testified that if the plaintiff was only 28 feet away she could have seen him and she went on to say that if she had seen a motor cycle that close she would not have come out of the junction. She said all this in examination-in-chief. In cross-examination the defendant said that she stopped at the junction for about 5 minutes, the reason for her stopping that long being that there were motor vehicles travelling on both sides. She admitted to it being a very busy road. She testified that if the road is very busy and if one has to come out of the junction "they" had to come out very fast. She said that she had to stop at the junction because she wanted both sides to be clear. When she stopped at the junction she applied her foot brake and her hand brake. She said that this was because the road was a slope. In this regard the photographic evidence shows the side road sloping downwards from the main road. The defendant went on to testify that when she moved and veered to the right she released her hand brake. The defendant said when she heard the sound she looked out of the window of her car and saw the motor cycle and the boy fallen near the car. The motor cycle, she said, was near the rear wheel of her side and the plaintiff was near the motor cycle but she could not say where. The defendant said that she had to turn her car to the right and repeated that she heard the collision.

The defendant's husband gave evidence in chief to the effect that he was in the car at the relevant time and that there was an accident with the motor cycle, that he helped the plaintiff and sent him to the hospital. He was then "offered" for cross-examination by Counsel for the defendant. This witness was cross-examined but that examination was only in respect of the assistance he rendered to the plaintiff and what transpired thereafter. Quite clearly both Counsel were at pains not to question this witness on any matter relevant to the issues in the case.

However when the time came for submission both Counsel were up in arms over the testimony or rather the lack of testimony of the defendant's husband DW2. It was contended on behalf of the defendant that the husband having been offered for cross-examination was not cross-examined as to essentials and reliance was placed on the decision of Raja Azlan Shah CJ, now DYMM Yang di-Pertuan Agong, in *Wong Swee Chin v. PP* [1981] 1 MLJ 213. Counsel for the plaintiff on the other hand submitted that the husband had not given any evidence as to how the accident happened and if any adverse inference had to be drawn it should be drawn against the defendant by virtue of the provisions of s. 114(g) of the Evidence Act. In *Wong Swee Chin's* case his Lordship said that there is a general rule that failure to cross-examine a witness on a crucial part of the case will amount to acceptance of the witness's testimony, but that, as is common with all general rules, there are also exceptions and then the learned Judge referred to the judgment of the Supreme Court of New Zealand in *Transport Ministry v. Garry* [1973] 1 NZLR 120 where Haslam J said at p. 122 as follows:

In *Phipson on Evidence* 11th Edn., para. 1544 the learned authors suggest examples by way of exception to the general principle that failure to cross-examine will amount to an acceptance of the witness's testimony, *viz.*, where:

> ...the story is itself of an incredible or romancing character, or the abstention arises from mere motives of delicacy...or when Counsel indicates that he is merely abstaining for convenience, e.g., to save time. And where several witnesses are called to the same point it is not always necessary to cross-examine them all.

It is significant that his Lordship described the rule as being general. That in my view is taken to mean that the facts and circumstances of a particular case need to be examined to ascertain whether the rule applies and if so to what extent. In this instance there was a failure to cross-examine the witness. So, following the rule, there had to be an acceptance of his evidence, evidence useless to the issues, which brings nothing to the application of the rules. The real complaint of the defence is that Counsel for the plaintiff had asked DW1 whether her husband had advised her that the road was clear to which she answered that he did not say anything and his failure to cross-examine the husband on that point must be taken to be an acceptance of the testimony of DW1 on the point. Counsel for the defendant seemed to be seeking some extension of the rule to cover this circumstance. I decline to do so, for with equal weight it can correspondingly be said of the defence that the failure to examine the husband on the point, he being a witness called by the defendant, should give rise to a presumption that if he did testify in chief on the point that testimony would have been adverse to that of DW1.

In the end I accepted the evidence of the husband for what it was. It was wholly irrelevant to any issue in this case. The examinations of this witness were an exercise in futility.

The police sketch plan was questioned by the defence as to its accuracy. The investigating officer who made the plan testified. In cross-examination he spoke to a distance from point D to point F therein being 41 feet. He then agreed with defence Counsel that the width of half the road was 41 feet but went on in his next sentence effectively to say that the tar road was 13 feet in width. He clarified his evidence in re-examination when he said that F to D included the side road. Thus to my mind there was no doubt that the width of the one directional road along and across which the plaintiff and the defendant were respectively travelling was 13 feet. I believe that the plaintiff was riding more or less along the crown of the road when the collision occurred whereafter the motor car carried on for a bit before stopping at or slightly over the longitudinal intermittent white line which divides the Kluang/ Mersing road. It was natural for the motor car to carry on for a while after the collision as it would have taken time thereafter for the defendant to react, apply the brakes of the motor car and the brakes to take effect before the motor car became stationary. In making my finding as to where in relation to the road the collision took place I had in mind the *dictum* of Gill FJ, as he then was, in *Yeoh Cheng Han v. Official Administrator, Malaya* [1972] 2 MLJ 7 at p. 12 which is to the effect that it has been said in these Courts again and again that the position of vehicles after the accident can afford absolutely no proof as to their respective positions on the road immediately before or at the moment of collision, unless there is the clearest evidence to show that the vehicles involved in the accident stopped dead upon impact. In this instance there was no question of the vehicles coming to a dead stop when they collided.

It was a main contention of the defence that the motor cyclist should not have been travelling as he was in the middle of his side of the road but on the left edge of the road. It was suggested that if he was doing that he would have passed behind the motor car and there

would have been no collision at all. The defendant did not plead particularly in this regard as indeed she should have. See O. 18 r. 12 of the Rules of the High Court and the case of *West Rand Central Gold Mining Co. v. R.* [1905] 2 KB 391 at p. 400 where Lord Alverstone CJ cited with approval the *dictum* of Willes J in *Gautret v. Egerton* [1867] LR 2 CP 371 which was in relation to a claim in negligence and was to the effect that a plaintiff in such a claim "ought to state the facts, upon which the supposed duty is founded, and the duty to the plaintiff with the breach of which the defendant is charged". In *Wells v. Weeks* [1965] 1 All ER 77, as in the present case, the plaintiff was a motor cyclist who brought an action against the defendant driver of a motor car. In his statement of claim the plaintiff set out particulars of negligence alleged in a paragraph ending with the words, "the plaintiff will also rely on s. 74 of the Road Traffic Act 1960, and on all the provisions of the Highway Code applicable to the drivers of motor vehicles in so far as the same are applicable in the circumstances". The action came on for hearing without further and better particulars of the statement of claim being requested or supplied, and Counsel for the plaintiff stated that the wording was adapted from *Bullen & Leake's Precedents of Pleadings* (11th Edn.) p. 537. Lawton J said that pleading in such an imprecise manner was virtually inviting a request for further and better particulars of the statement of claim, and he was surprised that no such request had been made but said he would, however refrain from commenting further. Particulars were then ordered of the particular provisions of the Code relied on. In this case the defendant's particulars constituted a comprehensive accusation of nearly every misfeasance a motorist is capable of committing on a public road. The particulars are as follows:

(a) Failing to keep any or any proper lookout;

(b) Riding recklessly and with reckless disregard for other road users particularly the 1st defendant and motor car No. JAN 8093;

(c) Riding without due care and attention;

(d) Failing to see the 1st defendant and motor car No. JAN 8093 at all or in sufficient time so as to avoid the said collision;

(e) Failing to horn and/or give and/or any sufficient indication of his presence on the said road;

(f) Riding at an excessive speed under the circumstances;

(g) Failing to give any and/or any adequate warning signs and/or signals of his intention so as to avoid the said collision;

(h) Failing to take any other evasive measures in the circumstances so as to avoid the said collision;

(i) Putting the defendant into such a state of emergency so as to give him no opportunity of avoiding the said collision;

(j) Failing to exercise reasonable skill and prudence in the control and management of the said motor cycle No. JBN 2806;

(k) Failing to comply with the provisions of the Highway Code and the regulations made therein;

(l) Emerging from a side road without having proper lookout;

(m) Failing to take the necessary precautions so as to avoid the said collision;

(n) Failing to let the defendant to pass first before proceeding on the said road;

(o) Failing to stop, slow down and/or swerve the said motor cycle No. JBN 2806 so as to avoid the said collision;

(p) Failing to stop when the traffic lights were against the plaintiff;

(q) Riding in such a reckless and unsafe manner so as to create a dangerous situation and thereby causing the collision.

It will be seen at once that a number of the said particulars are repetetive and (l) and (p) are wholly irrelevant to the instant case and tend to confuse rather than define the issues. They indicate an insensitivity on the part of the pleader of the defence in pleading to the facts. Instead, apparently without much consideration thereto, he has cast his net wildly and as widely as possible so as to catch everything. This in the end, to my mind, amounts to not providing any particulars at all. Unfortunately the practice of pleading particulars of negligence in the way the defendant has done in this case is rampant. The view I take is that particulars so pleaded, amounting in the end to effectively no particulars at all, are of no assistance to a party having to answer an allegation of negligence and this practice should be discouraged. It is trite that the principal objects of pleading are firstly to define the issues of fact and questions of law to be decided between the parties and secondly to give fair notice of the case which has to be met so that the opposing party may direct evidence to the issues disclosed by them. See *Esso Petroleum Co. Ltd. v. South Port Corporation* [1956] AC 218 per Lord Normand at p. 238. The Court in carrying out its function of doing justice between the parties according to law should have before it pleadings which are in all respects proper and definitive of the issues to be tried, and ordinarily would insist on the same regardless as to whether or not there is objection, so as to facilitate the carrying out of that function. In this case however I take into consideration that there was no complaint from the plaintiff in respect of the defendants' pleadings or the lack of it. On the contrary, the defendants' allegation in regard to the plaintiff not having travelled on the left edge of the road was fully argued. Accordingly I will take the matter into consideration.

The view I take is that the validity of the defendant's contention that the defendant should have been riding as close as possible to the left edge of the road depends on its relevance to the *causa causans* of the accident. *Causa causans* has been interpreted by Judges to mean the real decisive cause of the accident. See the *dictum* of Lord Esher MR, on *Pandorf v. Hamilton* [1886] 17 QBD 670 at p. 674. My function, so it seems to me, is to find the real decisive cause of the accident and whether the plaintiff has a share in the responsibility for the damage he has suffered.

Admiralty Commissioners v. S.S. Volute [1922] 1 AC 129 was a case where dealing with the question of contributory negligence, Viscount Birkenhead said at p. 144;

> Upon the whole, I think that the question of contributory negligence must be dealt with somewhat broadly and upon commonsense principles as a jury would probably deal with it. And while, no doubt, where a clear line can be drawn, the subsequent negligence is the only one to look to, there are cases in which the two acts come so closely together and the second act of negligence is so much mixed up with the state of things brought about by the first act that the party secondly negligent, while not held free from blame under the Bywell Castle rule, might, on the other hand, invoke the prior negligence as being part of the cause of the collision so as to make it a case of contribution.

In *Boy Andrew (owners) v. St. Rognvald (owners)* [1948] AC 140 Lord Simon said that the question, as in all question of liability for a tortious act, is, not who had the last opportunity of avoiding the mischief, but whose act caused the wrong.

In *Stapley v. Gypsum Mines LD* [1953] AC 663 at p. 687 Lord Asquith said:

> I am persuaded that it is still part of the law of this country that two causes may both be necessary pre-conditions of a particular result-damage to X - yet the one may, if the facts justify that conclusion, be treated as the real, substantial, direct or effective cause, and the other dismissed as at best a *causa sine qua non* and ignored for the purpose of legal liability.

The ultimate authority is contained in s. 12(1) of the Civil Law Act 1956 which provides for the Court to consider whether the damage suffered by the plaintiff was a result partly of his own fault and partly of the fault of the defendant and if so to reduce the damages to such extent as the Court thinks just and equitable having regard to the plaintiffs share in the responsibility for the damage. Whilst causation is the decisive factor in determining whether there should be a reduced amount payable to the plaintiff, that amount does not depend solely on the degree of causation but a consideration, not only of the causative potency of a particular factor but also its blameworthiness. See the *dictum* of Denning LJ, as he then was, in *Davis v. Swan Motor Co. (Swansea) Ltd. James Third Party* [1949] 2 KB 291 at p. 326:

> Whilst causation is the decisive factor in determining whether there should be a reduced amount payable to the plaintiff, nevertheless, the amount of the reduction does not depend solely on the degree of causation. The amount of the reduction...involves a consideration, not only of the causative potency of a particular factor, but also of its blameworthiness.

If the plaintiff would have escaped unscathed by riding his motor cycle more to the left and passing behind the motor car that would have been sheer good fortune; as it would likewise have been if he had passed that way a few seconds before or after the accident. The plaintiff in this regard did not at all contribute negligently to the cause of the accident and had no share in the responsibility for the damage he suffered. His requirement to keep to the left hand side of the road pursuant to the provisions of r. 13 of the Highway Code could have been in respect of a duty he owed to certain other users of the road but not the defendant, who was on the side road to the left of him intending to drive the motor car onto the road. There was no question of the defendant driving onto the main road in right and reasonable expectation of the defendant riding along the left side of the road, which he was not doing, thereby resulting in the accident. In fact in relation to the defendant and her motor car he would have been safer near the crown of the road where I found he was rather than on the left and closer to the car.

I considered the plaintiff to be a truthful witness in every respect. He gave his evidence in a simple and straightforward manner. He was rigidly cross-examined but in no way did he waver.

As to the defendant, I accepted her testimony as to how the accident happened except that there was some uncertainty in her evidence as to whether she moved from her stationary position at the junction fast or slowly. Driving a motor car along the Kluang/Mesing road with a crest to the defendant's right carries the risk of collision by reason of vehicles coming fast over the crest. A prudent driver in the situation the defendant found herself in would have crossed the road with all reasonable speed once the road was found to be clear on both sides. The defendant knew this. She said so expressly. Yet she claimed to do the opposite. I did not believe her. I believe that once it was in her mind that the road was clear she sped across the road.

Another main contention by the defence was that the plaintiff was riding his motor cycle very fast. I do not accept that contention. Neither Counsel made any submission in regard to the resultant damage to the 2 vehicles. The motor cycle collided head on into the driver's door of the motor car. A perusal of the photographs showed that the damage to the door was not great. The front wheel of the motor cycle appeared to be intact. Granted the head on collision, the plaintiff's evidence speaks to that, I would have expected that if the motor cycle was travelling at great speed the front wheel would have been bent if not buckled and the damage to the door of the car would have been much worse than was evident. No such thing happened. The accident happened at about 7.30 p.m. The defendant made a police report at 10.05 p.m. the same night. In it she said that the motor cycle came with speed and collided into her motor car. She did not say this in evidence as would have been expected if that was her version. Her evidence points to her not seeing the motor cycle in motion at all. My finding based on the evidence is that the motor cycle was not travelling fast and that the defendant's police report in that regard was not true. The plaintiff said that he had no time to avoid the accident. This is corroborated by there being no evidence of brake marks on the road, indicating that the brakes were not or not effectively used. Thus the speed of the motor cycle was not reduced by braking which in the light of the damage to the vehicles is another factor pointing to the motor cycle not being ridden with speed.

The plaintiff spoke to the corner being blind. He could not see a car coming from the side road before it reached the junction. The defendant did not deny this. The police investigating officer confirmed that the side road is straight but slightly downhill. I accept the plaintiff's evidence in this regard but consider it irrelevant. The sketch plan showed a line across the side road indicating a requirement to stop thereat. The side road led onto the main Kluang/ Mersing road. In the circumstances it would have been gross negligence not to stop. The defendant of course did stop. Thus she was at the mouth of the junction in full view of motorists on the main road including the plaintiff. In the event it did not matter that the plaintiff could not see the motor car before it stopped.

How then did the accident happen? Having observed the demeanour of both the plaintiff and defendant and considered their testimony carefully as I did all the evidence adduced at the trial, the view I take is that the defendant did not see the plaintiff at all. She did not see him until she looked out of the broken window of her car and observed him on the ground by his motor cycle by the back wheel of the car. True when she was stationary at the junction she looked on both sides and ensured that nothing was coming. She then directed her mind to engaging the first gear, taking her foot off the brake pedal accelerating and at the same time or thereabout releasing the hand brake and the clutch and proceeding and fast at that as she herself recommended. It was not an easy manoeuvre. As the defendant herself testified, the motor car was on a slope and held secure by the hand and foot brakes. Otherwise it would have rolled back. The view I take is that in doing this the lady gave her whole attention to that action. She did not then look again to see whether the road was clear before proceeding. This seemed to be so because the defendant did not testify to seeing the motor cycle coming to her. She did not see the motor cycle at all. She only heard a sound and saw something flying and she heard the sound when she was turning the steering. I find that the plaintiff was riding his motor cycle at about 60 kmh, that he was, as he testified, about 28 feet from the junction when the motor car dashed out, that he collided into the car and by reason of the close proximity there was nothing he could do to avoid the collision. I therefore find the defendant wholly liable in negligence for the accident.

The plaintiff was severely injured in the accident. According to the agreed medical report given under the hand of a consultant orthopaedic surgeon the plaintiff is a complete paraplegic, with no sensation below the thoracic cage, condemned more or less to a wheelchair existence. Because of loss of sensation he has sustained several bed sores. He cannot pass urine and faeces and requires an indwelling catheter to void his urine and he would sometimes require manual evacuation of his faeces in order to clear his rectum.

At the time of the accident the plaintiff was employed as a quality control officer with Scott Paper earning an overall average income of RM630 per month. Scott is a company which manufactures tissue papers, toilet rolls, towels and so on. Both he and his employer contributed to the employees' provident fund, the employer's contribution being 11% of the plaintiff's basic salary of RM395, the plaintiff's contribution being RM44 per month. Basically his work was to inspect goods that were received by the company and kept in the store. His employers were good. They did not terminate his employment straightaway. They were hoping the plaintiff would go back to work. The factory was at 4½ milestone Jalan Kluang, Mersing. The plaintiff has not worked since the accident. He testified that he is cleaned 2 to 3 times a day. His faeces and anus have to be cleaned 2 to 3 times a day and he has sores on his backside. He is looked after by his father-in-law who gave up his job to do so. His wife is working but notwithstanding that, she and her relatives also help the plaintiff in cleaning him daily.

The financial control officer of Scott Paper testified. He said that he had seen the plaintiff in his wheelchair. He did not think the plaintiff could resume his occupation in the company, that in fact they were trying to offer him a lighter job but because of his difficulties to dispose off his urine and faeces it was not possible to engage him, that in fact they tried to convert one of the toilets to accommodate him but because of his need to have someone to take care of him he could not be employed. This officer testified that the plaintiff's wife was also working at Scott Paper and was still doing so at the time of his testifying. He added that the company did not offer to reschedule the wife's duties to coincide with the plaintiff's. Harking back to the medical report, the surgeon said the plaintiff certainly would not be able to engage in his former occupation as a quality control officer. He would also not be able to engage in any occupation that requires the free use of both his lower limbs. At best the patient would be able to work in a sedentary job. Even in such a situation, he had to take care to relieve pressure on the parts of his body where there was no sensation. His disabilities were liable to be permanent and progressive.

My finding is that although the plaintiff's former job was made available to him and his employers were prepared to make adjustment to accommodate his disabilities the plaintiff nevertheless by reason of his injuries and consequent disability was and is unable to resume employment. The plaintiff was residing at Batu 8 Jalan Mersing, Kluang. In his immobile state how was he to go to and come back from work? Who would take him there and bring him home? At work he would have to be moved from time to time to allow for his bed sores. Who would do this for him? What is more who at work could be expected to assist him in his toiletry and clean him? No doubt his wife was working with him. There is no reason to believe that she was anything but a caring wife but was it reasonable to expect her to suffer the embarrassment of having to clean him in a public place? True this excellent employer offered to convert one of the toilets for the plaintiff but a reasonable inference is that it would be in the general toilet, either for men or women. If the former the wife would suffer additional embarrassment and if the latter, the husband. In any event it is trite that there is no legal obligation for the wife to tend the husband and there should be no question of the defendant who negligently caused the plaintiff's injuries seeking to mitigate damages by

relying on the gratuitous services of a third person. There was no evidence or even a suggestion that it was possible and financially viable for him to employ a nurse to accompany him to work. To my mind the plaintiff's condition was pathetically hopeless and it was impossible for him to resume his former employment or anything like it. There was no evidence of suitable sedentary employment for the plaintiff in the condition he has found himself as a result of his injuries. There was no offer or suggestion in this regard coming from the defendant. It was not put to the plaintiff or any other witness in cross-examination or at all that the plaintiff had available to him such employment. It is true that a plaintiff must take all reasonable steps to mitigate the loss to him consequent upon the defendant's wrong. See *Mc Gregor on Damages* 13th Edn., p. 145. However as I see it the burden of proof is on the defendant to show that the plaintiff should have taken certain steps to mitigate his loss and the normal measure of damages will not be cut down unless the defendant succeeds in showing that the plaintiff ought reasonably to have taken suggested mitigating steps. See *Roper v. Johnson* [1873] LR 8 CP 167 which was confirmed in *Garnac Grain Co. v. Faure & Fairclough* [1968] AC 1130. This was a case concerning a dependency claim under the English Fatal Accident Acts where Parker LJ, as he then was, in his judgement at p. 84 said:

> (Once a person... is shown to be a person who has suffered a loss of dependency, then the *onus* shifts. It is then for the defendants to show, if they can, that on the facts of the case the dependency originally lost has been reduced or has ceased entirely). And in *Baker v. Dalgleish S.S. Co.* [1922] 1 KB 361 (CA), where the dependants were in receipt of a Crown voluntary pension which, as the law then stood, fell to be taken into account in assessing their damages, Scrutton LJ took the view that it was up to the defendant to lead evidence that it was the Crown's prevailing practice not to reduce or cancel the pension on account of damages awarded.

The defendant failed to lead evidence of suitable alternative employment. There was no basis for me to take any sort of judicial notice in this regard. In any event I was not invited to do so. Accordingly I found myself unable to make any deduction in the multiplicand in regard thereto.

At the outset of the trial the parties agreed to the following items of damage:

General damages for pain and suffering and loss of amenities	RM120,000
Past loss of earning from date of accident to date of trial but reduced to a period of 15 months at RM630 per month	RM 9,450
Multiplier for future loss of earning be fixed at 14 years	
Other special damages claimed 3 to 14 as pleaded	RM 3,000
Cost of nursing care be fixed at RM200 per month.	

Those being the items agreed the parties acknowledged that the following were in dispute:

(a) Multiplicand to be used for future loss of earnings.

(b) Multiplier to be used for future nursing care.

(c) Whether annuity tables are to be used in calculating future loss of earnings and cost of future nursing care.

(d) Whether plaintiff is entitled to the loss of EPF contribution by the employer and if so for how long.

As to the multiplicand used for future loss of earning I find upon a consideration of all the evidence that it should be RM630. It was agreed that the multiplier will be 14. As to the multiplier to be used in respect of nursing care, the multiplicand having been agreed at RM200 per month, it was argued on behalf of the defendants that by reason of the plaintiff's injuries his expectation of life has been reduced. For that proposition Counsel relied on the surgeon's report wherein he said that the plaintiff by reason of his not being able to pass urine was prone to infection of his kidneys and bladder which can even endanger his life. The defendant complained that the plaintiff has failed to give evidence of the extent of his shortened expectation of life. The view I take is that men in this country ordinarily can expect to live until they reach the age of 70 years. Accordingly I do not consider a multiplier of 14 in this regard unreasonable.

To my mind the plaintiff is entitled to be compensated for the loss of his employer's contribution to the Employees' Provident Fund. The multiplier in this regard should also be 14.

In the end I find that the plaintiff is entitled to the following damages:

(a) Pain and suffering and loss of amenities agreed at	RM120,000
(b) Pre-trial loss of income agreed at RM630 per month x 15 months	RM 9,450
(c) Agreed special damages	RM 3,000
(d) Post trial or future loss of earnings being RM630 per month x 12 months = RM7,560 per year x 14	RM105,840
(e) Pre-trial cost of nursing care at RM200	RM 4,200
(f) Post-trial or future cost of nursing care	RM 34,200
(g) Pre-trial or past loss of EPF for 15 months	RM 660
(h) Post-trial or future loss of EPF (14 years x RM44)	RM 7,392

(i) Interest at 4% per annum on items (b), (c), (e), (f) and (g) from date of accident to date of judgment.

(j) Interest at 8% per annum on item (a) from date of service of writ to date of judgment.

(k) Costs of this action.

I adjudge accordingly.

Also found at [1991] 1 CLJ 150